

1                                    **BEFORE THE SHORELINES HEARINGS BOARD**  
2                                    **STATE OF WASHINGTON**

3       **SUZANNE C. TUNNEY,**                                    )

4                                    **Appellant,**                                    )

5                                    **v.**                                    )

6       **VALERIE and RILEY HOPKINS;**                                    )  
7       **PIERCE COUNTY; and STATE**                                    )  
8       **OF WASHINGTON, DEPARTMENT**                                    )  
9       **OF ECOLOGY;**                                    )

10                                    **Respondents.**                                    )

SHB

~~PCSHB~~ NO. 93-3

**FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER**

11                    This matter was heard by the Shorelines Hearings Board ("Board") on March 29, 1993,  
12 in Gig Harbor, Washington. Sitting for the Board were: Robert V. Jensen, attorney member,  
13 presiding; Harold S. Zimmerman, Chairman; Bobbie Krebs-McMullen, David Wolfenbarger,  
14 and Bob Patrick.

15                    The proceedings were recorded by Lenore Schatz, court reporter, affiliated with  
16 Gene S. Barker and Associates, Inc. of Olympia, Washington.

17                    Suzanne Tunney appeared through her attorney, Ronald S. Ripley. Valerie and Riley  
18 Hopkins were represented by William Lynn, attorney. Pierce County was represented by Jill  
19 Guernsey, Deputy Prosecuting Attorney. The Department of Ecology did not participate in  
20 the hearing.

21                    Having heard the testimony, examined the exhibits, heard oral argument, and reviewed  
22 the briefs submitted on behalf of Suzanne Tunney and Pierce County, the Board makes these:

23                                    **FINDINGS OF FACT**

24                                    **I**

25                    Valerie and Riley Hopkins ("the Hopkins"), own a residence on the shoreline of  
26 Henderson Bay, on Puget Sound and within Pierce County. It lies within a Rural-Residential  
27 designation, under the Pierce County Master Program ("PCMP"). They purchased the three-

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1 bedroom house in the late 1970's. The Hopkins intend to raise a family, and believe that the  
2 current 1656 square feet does not provide ample room for this purpose. Accordingly, they  
3 filed for a shoreline variance from Pierce County, for an additional 946 square feet  
4 improvement.  
5

## 6 II

7 The variance is required because portions of the proposal are within the shoreline  
8 setback distance of 50 feet from the ordinary high water mark. Although the addition will not  
9 project shoreward of the existing residence, it will add a total of seven and one-half (7 1/2) feet  
10 to the height of the structure. An approximately 25 foot long, irregular section of the addition  
11 will extend eastward from, and outside of the footprint of the existing house.

## 12 III

13 Suzanne Tunney and her husband, James DePew, live directly south of the Hopkins.  
14 Suzanne Tunney's parents purchased the property in 1957. She was 16 years old at the time  
15 the family moved in. At that time the Hopkins' property was owned by a Mr. Wyland.

## 16 IV

17 In 1963, Mr. Wyland tore down the small cottage that then stood on the Hopkins'  
18 property. Contemporaneously, the underlying ground was bulldozed to a lower elevation. Up  
19 to that time, the Tunney and Hopkins' properties were at essentially the same elevation.

## 20 V

21 Mr. Wyland, in the same year, built the house that currently occupies the Hopkins'  
22 property. Two of the three bedrooms of that residence face the water, which is to the west.  
23 The southerly foundation of that house was built approximately two feet from the Tunney  
24 property line. The evidence did not establish whether a variance from the existing side yard  
25 set back of eight feet, was ever obtained.

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VI

In 1983, Suzanne Tunney and her husband replaced the earlier structure with the present dome residence. The dome is within the same footprint as the previous structure and a tool shed, which was adjacent to the house on the south. The dome is approximately the same height as the original home. Based on conversations with representatives of the Pierce County Building Department, the couple believed that they would not be able to obtain a variance if they went beyond the footprint or height of the prior house.

VII

The view to the west and northwest, from the Tunney residence, is essentially one of cedar trees and water. The Hopkins' proposed addition would obstruct most of this northwest view from the Tunney kitchen eating area.

VIII

The Hopkins, Tunney-DePews and seven other families share a private access road to their residences. The Hopkins have applied for a variance from the Pierce County Fire Marshal, to the requirement for a 24 foot roadway and a 90 foot turn-around for fire access. The Fire Marshal, on February 13, 1992, responded that it could not grant a variance from the requirement, but could approve options in lieu thereof, through "alternate methods and materials".

IX

The Hopkins' home could continue to be used as a residence, if the variance were denied. There is level yard behind the existing home, to the north of the proposed addition, which possibly could be used for expansion of the home.

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The Hopkins did not consult with Mrs. Tunney or her husband, prior to submitting their plan to Pierce County.

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XI

The PCMP, with its current setback requirement, was approved by the Department of Ecology on April 4, 1975. When it was adopted, the Hopkins, Tunney-DePew, and several homes in the area, were shoreward of the 50 foot setback requirement of the PCMP.

XII

The proposal is subject to the Gig Harbor Development Regulations. The project was recommended for approval by the Peninsula Advisory Commission. It was approved by the Pierce County Hearing Examiner and affirmed by the Pierce County Board of Commissioners. The Department of Ecology concluded that the variance met the "intent of the master program and the criteria set forth in WAC 173-14-150 for granting a Variance.

XIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.  
From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

Variances are designed as escape valves from imperfect land use ordinances. 3 R. Anderson, American Law of Zoning 3d, sec. 19.10 (1986). This mechanism allows governmental entities to avoid applying land use restrictions which would deny a property all beneficial use of the property. Id. at sec. 20.02.

II

Pierce County has adopted the restrictive approach to variances, which it is allowed to do under Department of Ecology Regulations. WAC 173-14-155 provides that:

*Local government and the department may, in addition, apply the more restrictive criteria where it exists in approved and adopted master programs.*

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1 The Pierce County Master Program ("PCMP") contains the following criterion for obtaining a  
2 variance, which is more restrictive than that found in WAC 173-14-150:

3  
4 *The property owner must show that if he complies with the*  
5 *provisions he cannot make any reasonable use of his property.*  
6 *The fact that he might make a greater profit by using his property*  
7 *in a manner contrary to the intent of the program is not a*  
8 *sufficient reason for a Variance.*

9 PCMP, sec. 20.72.020.

### 10 III

11 The Board affirmed application of this standard in Simchuk and Pierce County v.  
12 Department of Ecology and Stoltenberg, SHB NO. 84-64, (1985). There the Board declared  
13 that:

14 *The approved and adopted master program (PCSMP) does*  
15 *contain a more restrictive criteria than the minimum criteria of*  
16 *the DOE. This is because the PCSMP criteria, unlike the DOE*  
17 *criteria, requires the applicant to carry a heavy threshold burden*  
18 *of proving that without a variance, he cannot make any*  
19 *reasonable use of his property. Accord, Green v. Bremerton,*  
20 *SHB No. 81-37 (1982) and Pier 67, Inc. v Seattle and DOE,*  
21 *SHB No. 81-31 (1981).*

### 22 IV

23 Simchuk has not been overruled. Pierce County and the Hopkins' cite Pattu Browne v.  
24 Pierce County, Department of Ecology and Robert Pavolka, SHB NO. 98-31 (1991), to  
25 support granting of the variance. That case, however makes no mention of the more  
26 restrictive PCMP criteria which is cited above. It therefore is inapposite. Factually, that case  
27 is further distinguished by the fact that directly behind the house proposed for expansion, was  
a steep bank. Expansion of the home landward, would have necessitated excavation into and  
could have required blasting of this bank. The Board concluded that such excavation was  
likely to cause a significant adverse impact. Browne, at 8.

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V

The burden of proof before the Board, lies with Suzanne Tunney, the appellant. RCW 90.58.140(7). She has satisfied this burden under the facts of this case.

VI

Variances are exceptions to the rule. The Shoreline Management Act ("SMA") is to be liberally construed on behalf of its purposes. RCW 90.58.900; Clam Shacks v Skagit County, 109 Wn.2d 91, 93, 97, 743 P.2d 265 (1987). Concomitantly, exceptions to its regulations must be strictly construed. See Mead School Dist. v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding that the liberal construction command of the Open Public Meetings Act implies an intent that the Act's exceptions be narrowly confined).

VII

The purpose of the 50 foot shoreline setback requirement in the PCMP is to protect public use of the shoreline, to preserve the aesthetic quality of the shoreline, and to protect the environment.

VIII

The PCMP bulk regulations for residential development, also provide the following limitation on the expansion of structures which were in existence prior to the effective date of the Master Program:

*Existing buildings and structures in existence on or before the effective date of this Title may be remodeled or rebuilt in the same location, provided the ground floor lot area of the said building is not increased and further provided that the building or use thereof shall have been and continues to be conforming to these regulations and shall be for the same use.*

PCMP, sec. 20.62.050(D)(4).

IX

Mike Erkkinen, Pierce County Senior Planner, and currently Shoreline Administrator, testified that the above provision does not apply to that portion of the addition planned to be located outside the 50 foot setback area. He admitted, however that this interpretation of the Master Program is not in writing. He also testified that this provision has not always been applied the same way by the County in the past.

X

Interpretation of a master program is a matter of law. While interpretations of master programs by local governments are entitled to some deference, we find no support in the PCMP for the County's interpretation. There is no qualifying language in the PCMP which limits section 20.62.050(D)(4) to those portions of residential structures within the 50 foot setback area. Moreover, that interpretation is contrary to the liberal construction requirement of the SMA. The purposes of the SMA are best fostered by interpreting this provision, such that exceptions to it may be made only through the granting of a variance.

XI

We conclude, therefore, that the Hopkins' proposal is properly considered as an application for a variance from both the 50 foot setback and the "footprint" regulations of the PCMP.

XII

The PCMP, at sec. 20.72.010, declares, in part the following purpose for variances and conditional uses:

*To insure that strict implementation of the Master Program will not create unnecessary hardships or thwart the policy enumerated in Section 90.58.020 RCW; variance, conditional use, and nonconforming use provisions are provided to help implement the Master Program.*

*Any such variance or conditional use shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effects.*

The evidence demonstrates that although the purpose of the proposed addition is not unreasonable, the threshold for obtaining a variance requires a showing of unnecessary hardship and extraordinary circumstances. We find neither in this case. The current home has three bedrooms and 1656 square feet. This is reasonable for a residence. Moreover, there is additional space to the east of this residence, which provides room for expansion; as an alternative to elevating the structure.

## XIII

The Hopkins thus, have a reasonable use of the property, in the absence of the granting of a variance. Most certainly, the denial of the variance will not deny them of all reasonable use of their property. Pierce County has chosen a strict standard for variances, in PCMP, sec. 20.72.020. That standard is consistent with the rigorous program of protection provided under the SMA.

## XIV

The proposed development is inconsistent with PCMP, sec. 20.72.020(E), which requires:

*That the specific provision or provisions to be relaxed clearly did not foresee or consider the particular situation the applicant is facing.*

The owners of properties in the area, which consists of high bank waterfront, many of whose homes lie within the 50 foot setback, face a situation which existed when the PCMP was adopted. The excavation on the Hopkins' property occurred prior to that adoption. Approval of the variance can only encourage similar proposals, as one owner after another vies to maximize its view, to the detriment of its neighbors.

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XV

Mrs. Tunney contends that section 20.72.020(C), of the PCMP, is violated by the proposal. We disagree. That section contains the following criterion for variance approval, which requires:

That no other applicable regulations will be violated, abrogated, or ignored.

XVI

Mrs. Tunney argues that this provision is violated because the proposal is inconsistent with the Gig Harbor Development Regulations, and the Pierce County Fire Code. She bases her argument on PCMP, sec. 20.62.040, which states, in relevant part:

*NOTE: The Pierce County Zoning Code and other County requirements also contain density, setback, and lot width requirements which are also applicable in shoreline areas. These regulations must also be consulted, when appropriate, when developing on the shoreline. In case of a discrepancy between the requirements of this Code and the Zoning Code, or other regulations, the most restrictive regulation shall prevail.*

XVII

We have earlier denied a partial summary judgment motion, which was based on the theory that the PCMP did not incorporate by reference the Gig Harbor Development Regulations and the Pierce County Fire Code. Our earlier decision was based on the belief that there was an inadequate factual record upon which to base a final decision. The evidence submitted persuades us that these provisions are incorporated by reference, under the principle announced by the Board in Severns v. Department of Ecology, SHB NO. 80-2, at 5-6 (1980), and Knapp v. Kitsap County and Hammer, SHB NO. 85-17, at 5 (1986).

XVIII

Although the Hopkins' home does not conform to the underlying side yard setback requirement of eight feet (Pierce County Zoning Code, sec. 9.12.070), Mrs. Tunney failed to establish, through competent evidence, that the builder of that home did not obtain a variance

1 from Pierce County. Mrs. Tunney earlier testified before the hearing examiner, that the  
2 property owners had agreed to the two foot-side yard setback. If the lack of a variance had  
3 been established, the home would not qualify as a lawful structure, predating the Gig Harbor  
4 Development Regulations. It would then, not pass as a permitted use under those regulations.  
5

#### 6 XIX

7 Likewise, the evidence does not support a conclusion that the proposal does not meet  
8 the Pierce County Fire Code. The testimony of the Fire Marshal, which was unrefuted, was  
9 that the Hopkins' proposal could meet the Fire Code through alternate methods and materials.  
10 It is the interpretation of Pierce County that the Fire Code requirements attach at the time of  
11 the approval of the building permit. We need not decide this issue, however, having  
12 concluded that the proposal will meet the requirements. The Board looks at this issue de novo,  
13 and base our conclusion on the testimony at the hearing.

#### 14 XX

15 The proposal also is inconsistent with the following criteria for variances, contained in  
16 the Department of Ecology regulations: WAC 173-14-050(2)(b)-(d), and (4).

#### 17 XXI

18 WAC 173-14-050(2)(b) requires the following showing, in order for a variance to be  
19 granted:

20 *That the hardship . . . is specifically related to the property, and*  
21 *is the result of unique conditions such as irregular lot shape, size,*  
22 *or natural features and the application of the master program,*  
*and not, for example, from deed restrictions, or the applicant's*  
*own actions;*

23 Although the property has restraints, it is not those restraints that compel this application. It is  
24 rather the preference of the Hopkins for building above, as opposed to behind, their existing  
25 home, that triggered the variance request. In order to meet this test, the property must itself  
26 deprive the owner of all reasonable alternatives.

27 FINAL FINDINGS OF FACT,  
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XXII

WAC 173-14-050(2)(c) requires:

*That the design of the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment;*

The Hopkins' proposal would significantly and adversely effect the use and enjoyment of the adjacent Tunney property. The actual extent of view interference in this case is, however, irrelevant to our decision. Approval of this variance, as was indicated above, is likely to encourage further proposals which will adversely impact the view of existing residences.

XIII

WAC 173-14-050(2)(d) necessitates a demonstration:

*That the requested variance does not constitute a grant of special privilege not enjoyed by the other properties in the area, and is the minimum necessary to afford relief;*

We have already concluded that the proposal is not necessitated by the topography of the site. There is space to the east of the existing home for expansion. It follows that the variance provides more than is necessary for relief from SMA regulation.

XXIV

The proposal is inconsistent in addition, with WAC 173-14-050(4), which directs that:

*In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area.*

There are several homes along this beach which are shoreward of the shoreline 50 foot setback. Approval of this variance would be likely to trigger an accumulation of proposals, over the years, as neighbors continue to vie for the maximization of their enjoyment of the scenic shoreline vista which is characteristic of this beautiful area. This is contrary to a central

1 purpose of the setback provision, which is to preserve the overall aesthetic quality of the  
2 shoreline. An equally important and obvious objective, is to protect the views from the  
3 shoreline, as they existed on the date of adoption of the setback requirement. The Hopkins can  
4 continue to enjoy the lovely view from their residence, without adversely impacting the view  
5 of their neighbor.  
6

#### 7 XXV

8 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.  
9 From the foregoing, the Board issues this:  
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**ORDER**

Pierce County's and The Department of Ecology's approval of a variance to Valerie and Riley Hopkins to construct a 946 square foot addition to their residence, which is located within the 50 foot setback line of Henderson Bay on Puget Sound, is reversed.

DONE this 19th day of May, 1993.

**SHORELINES HEARINGS BOARD**

  
ROBERT V. JENSEN, Presiding

  
HAROLD S. ZIMMERMAN, Chairman

  
BOBBIE KREBS-MCMULLEN, Member

  
DAVE WOLFENBARGER, Member

  
BOB PATRICK, Member

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